

HUMAN RIGHTS FEATURES

(Voice of the Asia-Pacific Human Rights Network)

B-6/6 Safdarjung Enclave Extension, New Delhi 110 029, India.

Phone/Fax: +91-11-2619 2717 / 2619 2706 / 2619 1120

E-mail: humanrightsfeatures@gmail.com

Home Page: <http://www.hrdc.net/sahrdc/>

HRF/199/09

Embargoed for 26 September 2009

Ending Police Impunity

The need to establish and strengthen accountability mechanisms

The Chief Justice of the Supreme Court of India has recently called for an amendment to an anti-corruption law that requires that prior sanction be granted by a competent authority for the prosecution of a public servant.¹ The Chief Justice observed that the provision in the law contributed to “a climate of impunity where the requisite sanction is either delayed or denied by higher executive authorities”² This conclusion was endorsed by the Law Minister, who further suggested that Constitutional provisions shielding public servants from dismissal, removal or reduction in rank³ need to be revisited.⁴ While the criticisms of impunity in this context of corruption are most welcome, equally important steps must be taken to address prosecutorial impunity currently afforded to police officers.

Effect of official immunity

According to the Indian Code of Criminal Procedure (CrPC) Section 197 and its current interpretation and implementation, courts may not hear a case against a police officer unless the Central or State government gives authorization for said prosecution.⁵ Requiring government sanction for any prosecution of a police officer is a major impediment to bringing justice for serious abuses committed by police officers. Additionally, the unsurprising regular refusal of police officers to register First Information Reports (FIRs) and the threats and abuse faced by those who attempt to submit an FIR⁶ further impedes the pursuit of justice.

¹ Section 19, Prevention of Corruption Act, 1988

² Prabhakar Rao Voruganti, “CJI flays requisite sanction to prosecute public”, Express Buzz, 13 September 2009, at <http://www.expressbuzz.com/edition/story.aspx?Title=CJI+flays+requisite+sanction+to+prosecute+public&artid=msFsbX1VBdg=&SectionID=b7ziAYMenjw=&MainSectionID=b7ziAYMenjw=&SectionName=pWehHe7IsSU=&SEO=>

³ Articles 310 and 311.

⁴ “Amend statute to nail corrupt babus: Moily”, The Times of India, 14 September 2009, at <http://timesofindia.indiatimes.com/news/india/Amend-statute-to-nail-corrupt-babus-Moily/articleshow/5006715.cms>

⁵ Criminal Procedure Code, sec. 197. See also “Directive on Investigation of Cases by S.P.E. and Facilities/Cooperation to be Extended by Administrative Authorities”, Central Bureau of Investigation Manual, Chapter 17, para 17.45, at http://cbi.nic.in/aboutus/manuals/Chapter_17.pdf.

⁶ See, e.g., CHRI 2009 (of the 51,767 complaints made against police officers in 2007 according to the National Crime Records Bureau, more than half were simply dismissed).

At the same time, the Indian Supreme Court has interpreted Article 300(1) of the Indian Constitution to mean that individuals can not sue the government in tort or damage suits.⁷ While the Supreme Court has allowed for individuals to receive compensation for constitutional rights violations cases brought under Article 32 or Article 226⁸ of the Constitution,⁹ the Court has created difficult standards for obtaining compensation and has left the payment of any such compensation at the discretion of a presiding judge in a particular case.¹⁰

Given that a) prosecution of police officers requires government sanction and simply filing an FIR brings threats and intimidation, and b) an individual is not able to sue the State or Central government for police abuses, and can only receive any compensation at the discretion of presiding judges, victims of police abuses have little incentive to bring cases to achieve vindication of their rights and in turn police officers enjoy de facto immunity for serious abuses.¹¹ In order to ensure effective accountability and an end to police impunity, then, a) individual police officers who commit serious abuses must face criminal prosecution, and b) individual victims of police abuse must have the opportunity to receive just compensation. Indeed, both international law and the Indian Supreme Court have recognized the importance of such criminal and civil remedies for making victims whole, effectuating a system of justice, and deterring future abuse.¹²

More specifically, first the CrPC should be amended to allow for trial courts to take cognizance of cases without government sanction, at least in the case where police or other officers have acted in an unconstitutional manner or otherwise committed serious rights abuses.¹³ Additionally, the Constitution should be amended to allow for individuals to sue the State and Central Governments for serious police abuses that violate fundamental human and constitutional rights, and legislation should be passed to provide for mandatory compensation in cases brought under Article 32 and Article 226 of the Constitution.

Police Complaints Authorities

⁷ Kasturi Lal v. State of Uttar Pradesh, AIR 1965 SC 1039.

⁸ Article 32 of the Constitution provides individuals with the right to bring a case to the Supreme Court to enforce fundamental rights under the Constitution. Article 226 of the Constitution confers power on every High Court to execute orders in cases under its jurisdiction. Indian Constitution, Art. 32, 226.

⁹ Nilabati Behera (alias Lalita Behera) v. State of Orissa and Others, AIR 1993 SC 746; M.C. Mehta v. Union of India, AIR 1987 SC 1086 (found in *Eliminating Sovereign and Official Immunity in Fundamental Human Rights Cases: SAHRDC's submission to the National Commission for the Review of the Working of the Constitution*, South Asia Human Rights Documentation Centre, 9, 25 (Jan. 2001) (Hereinafter "SAHRDC Report – 2001")).

¹⁰ In different opinions, the Supreme Court articulated various standards including: violations that were "gross", "gravely unjust", "large scale", "unduly harsh or oppressive", "such as to shock the conscience of the judge," or involved lack of a factual controversy. See, e.g., Rudul Sah v. State of Bihar and Another, AIR 1983 SC 87, M.C. Mehta v. Union of India, AIR 1987 SC 1086, (found in SAHRDC Report – 2001).

¹¹ See SAHRDC Report – 2001, 25.

¹² See, e.g., Rudul Sah v. State of Bihar and Another, AIR 1983 SC 508; Bhim Singh, MLA v. State of J&K and Others, AIR 1984 SC 504; M.C. Mehta v. Union of India, AIR 1987 SC 1086; *International Covenant on Civil and Political Rights* (ICCPR), U.N. Doc. A/6316 (1966); Human Rights Committee, General Comment No. 31 on article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/74/CRP.4/Rev.6 (2004), para. 16.

¹³ See, e.g., *Broken System*, Human Rights Watch, 116.

If the government will not undertake the above amendments, or in conjunction with such amendments, Police Complaints Authorities have the potential to bring more effective prosecution and compensation awards and in turn help end police impunity. In 2006, the Indian Supreme Court directed all state governments to establish Police Complaints Authorities (PCAs) at both the state and district level to investigate individual claims of police abuse.¹⁴ Amongst other directives, the Court mandated that the state PCAs would investigate and make binding recommendations in cases of “allegations of serious misconduct by police personnel, which would include incidents involving death, grievous hurt or rape in police custody,” while the district level PCAs could also take cognizance of cases of a less serious nature, such as “allegations of extortion, land/house grabbing or any incident involving serious abuse of authority.” The Court emphasised that the PCAs would have the binding authority to make recommendations for administrative or criminal sanctions against a perpetrator of police abuse.¹⁵

Three years after the *Prakash Singh* decision, most states have not implemented the directives of the Court, and those states who have established PCAs have done so in a manner that does not match the required standards of the Court’s decision.¹⁶ Recently, the Union Home Minister has taken the welcome step of announcing that the Home Ministry will implement major police reform in Union territories that will include the establishment of PCAs.¹⁷

In light of the discussion in the previous section, PCAs will only serve as a useful mechanism to help bring about greater accountability for police abuses if they have the authority to effectuate prosecution for perpetrators of police abuse and/or compensation for victims of such abuse. With regard to prosecution, the PCAs should have the authority to initiate and assist in carrying out criminal prosecutions against police officers committing serious abuses. PCAs should have the powers of a Civil Court to investigate the veracity of a given complaint and within thirty days of the registration of said complaint make a prima facie finding of whether an abuse has taken place. Following a prima facie finding of serious misconduct, the PCA should lodge and have registered an FIR immediately thereafter.¹⁸

Further, the PCA should have the additional power to assist the court in an amicus capacity to prosecute police abuse cases. Currently, after conducting an investigation, police submit a charge sheet to a magistrate if they wish a case to be prosecuted, after which the magistrate decides whether to move forward with the prosecution, order further investigation, or dismiss the charges brought.¹⁹ As discussed above, individuals face many barriers in requesting the police to register

¹⁴ *Prakash Singh v. Union of India*, (2006) 8 SCC 1, 6.

¹⁵ *Prakash Singh v. Union of India*, (2006) 8 SCC 1, 6.

¹⁶ See, CHRI 2009, 26 (“CHRI’s research reveals that it is only in the states of Uttarakhand, Goa, Assam, Tripura and Kerala that Police Complaints Authorities have been established, staffed, and are receiving and inquiring into Complaints.”), and 54 (lamenting a lack of funds, investigators, office space, and other resources, as well as the violation of the requirement of having PCA members independent of the police, the failure to establish clear procedures for the PCAs, and the limited public awareness on the existence and mandate of the PCAs).

¹⁷ “One panel to police all union territories,” iGovernment: enabling good governance, 2 Sept 2009, Available at: <http://igovernment.in/site/One-panel-to-police-all-union-territories-in-India/>.

¹⁸ Given that the Supreme Court decision in *Prakash Singh* declared that PCA decisions would be binding, the prima facie finding of a violation should necessitate the filing of an FIR.

¹⁹ See *Handbook of Human Rights and Criminal Justice in India: The System and Procedure*, South Asia Human Rights Documentation Center, 27 (2006).

an FIR, including at times violent intimidation, due to police refusal to investigate one of their own.²⁰ Though granting the PCAs the authority to make a binding request upon the police to register an FIR and make follow up inquiries does partially address this problem,²¹ the fact that ordinary prosecutors may not be, or at least may not be perceived to be, independent because in many states of India, the Director of Prosecutions is a serving police officer warrants granting an institutional amicus role to PCAs themselves.

As such, PCAs should assist the prosecution to bring a charge sheet to a magistrate after conducting the requisite investigations,²² and assist in an amicus capacity the carrying out of the ensuing prosecution. Taken together, allowing PCAs to submit a report to a magistrate following an investigation, initiate proceedings without ever having to involve the police themselves, and ultimately assist the prosecuting authority further eliminates the possibility of police refusal to file an FIR and helps ensure the independence of the prosecution.

In addition, given the current inefficiencies, backlogs, and delays of the ordinary criminal justice system, PCAs should be able to assist in the prosecution of police abuses in either existing special courts or district level human rights courts authorized under the Protection of Human Rights Act of 1993.²³ Moreover, since under CrPC Section 197 courts cannot take cognizance of an offence by a police officer without government authorization, if the CrPC is not amended as proposed above, then the PCAs should have the power to assess the case and grant such authorization.

Turning briefly from prosecution to compensation, if the PCAs are not able to have the requisite authority, procedural adeptness, or resources to themselves issue monetary awards, they could be given the authority to serve as a means of eliminating the discretion given to judges in Article 32 or Article 226 cases. A PCA finding of serious police misconduct could be given the legal weight to act as a substitute to a judge's discretion in whether to award compensation or not if that judge finds a violation. Under that system, then, the court would no longer have the discretion to decide whether a given violation was severe or undisputed enough to warrant compensation; the PCA conclusion could constitute such a binding independent finding.

²⁰ See, e.g., CHRI 2009 (“the barriers to registration of an FIR are too well known to merit reiteration. When a complaint is to be registered against a police officer himself, it will simply not be registered. The complainant will inevitably be subjected to threats, harassment or even physical assault. It is a dangerous ordeal for anyone to exercise their legal right to bring criminal charges against a police officer.”).

²¹ According to CHRI, allowing the PCA to issue an order to the police to be registered as an FIR will help ensure that the FIR is registered with the appropriate charges, and help deal with the problem of violent intimidation. Through discussions with the head of the PCA in Kerala, Justice N. Mohandas, CHRI reports that in Kerala “[i]f criminal charges are recommended, then the PCA order is immediately sent to the concerned Station House Officer, the PCA statement is taken as the FIR and registered right away. As this comes as *prima facie* grounds from an Authority vested with the power to inquire against the police, Justice Mohandas stressed that the SHO has no discretion to alter the offences laid by the PCA.” CHRI 2009.

²² Indeed under CrPC Sections 190 and 202(1), individuals themselves can even bring complaints directly to magistrates, magistrates can direct people other than police officers to undertake investigations, and magistrates can initiate proceedings based on complaints other than police reports. Criminal Procedure Code, secs. 190, 202(1).

²³ The Protection of Human Rights Act, 1993 (As Amended by the Protection of Human Rights (Amendment) Act, 2006), No. 10 of 1994, 8 Jan. 1994, No. 43 of 2006, VI.30, *Available at*: <http://nhrc.nic.in/Publications/HRActEng.pdf>.

Conclusion

While the debate over police reform has recently focused in large part on fostering a police force independent from unwarranted political interference, accountability of the police themselves must play a large role in any reform efforts as well.²⁴ In order to reduce the number of serious human rights abuses, adequately support victims of such abuses, and ensure the rule of law and a just democracy in India, police must be held accountable for serious misconduct.²⁵ Whether through the PCAs or not, prosecuting police officers who commit serious abuses and enabling victims or their families to receive just compensation for abuses they suffer at the hands of police must serve as main components of bringing such accountability.

- *Human Rights Features*

²⁴ See, e.g., *Police Accountability: Too Important to Neglect, Too Urgent to Delay*, Commonwealth Human Rights Initiative, 36 (2005) (“The distinction between appropriate political direction from a government to a police force and inappropriate political interference in operational policing matters is important to establish in law, policy, and practice ... Clear and independent systems of accountability make it easier for police officers to assess and resist illegally motivated or inappropriate orders.”).

²⁵ See, e.g., SAHRDC Report – 2001, 15 (“De facto immunity creates an environment of impunity that encourages human rights abuses. Grave human rights abuses occur because officials have little reason to fear any legal consequences ... With armed forces and the police provided effective official immunity, the viability of democracy is seriously jeopardized.”).